IN THE

Supreme Court of the United States

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October Term, 1951.

No. 514

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

Prayer for Issuance of the Writ.

Your petitioner, LeRoy J. Leishman, respectfully prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 13, 1951, in the case of LeRoy J. Leishman, Appellant, v. General Motors Corporation, Appellee, Docket No. 12,485, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and such other relief granted as this Court may deem proper.

II.

Jurisdiction.

This Honorable Court has jurisdiction under Title 28, U. S. C. A., Section 1254, and 28 U. S. C. A., Section 2101, and petitioner is proceeding under Rule 38(5b) of the Rules of the Supreme Court.

The time period during which this petition should originally have been filed was extended on October 26, 1951, until January 7, 1952, by order of Mr. Justice Robert H. Jackson, Associate Justice of this Honorable Supreme Court.

III.

Summary Statement of Matter Involved.

This action was brought in the United States District Court for the Southern District of California by respondent General Motors Corporation against petitioner LeRoy J. Leishman. The complaint was filed under the Declaratory Judgment Act and requested the court to hold that claims 7 to 11 of petitioner's U. S. Patent No. Re. 20,827 were invalid, or, if valid, not infringed by certain radio push button tuning devices manufactured by respondent. Petitioner's answer denied that the said claims were invalid and not infringed by the said devices, and he filed a counterclaim alleging infringement and asking for damages.

The lower court held that the claims were anticipated and lacked invention; and the appellate court, arriving at its decision in a different manner than did the trial court, nevertheless affirmed the judgment.

The appellate court's decision which this Honorable Court is asked to review is the *eleventh* major decision

involving this patent that has been rendered by the Federal Courts in a series of four related suits extending over a period of thirteen years.[1] Few patents in the history of the patent system have occupied the attention of the courts for so long a time. The last two of these four suits were brought under the Declaratory Judgment Act by three large manufacturers apparently seeking to crush the inventor under an almost impossible load of litigation. In the United States District Court for the District of New Jersey, in a decision from which no appeal was taken, two of these manufacturers have since been fined $48,000.00 for violating the Sherman Act through illegal activities involving the very devices that were before the courts in one of these Declaratory Judgment Actions.[2] As these different suits have proceeded through the courts, the claims have variously been held valid and invalid, infringed and *not* infringed by devices that are patentwise the same.

As the appellate court correctly says in the opinion sought to be reviewed [R. 1187]:

> "The subject matter of the suit pertains to automatic tuning devices for radio receivers, devices by which a radio receiver may be tuned to particular stations by simply pressing a lever or pushing a button."

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[1]A brief summary of these eleven opinions is given in the appendix hereto, and most of them are also referred to in the introduction to the appended brief.

[2]*United States v. General Instrument Corporation, Radio Condenser Company, et al.*, 87 Fed. Supp. 157. Also Criminal Case No. Cr. 3960C.

The purpose of the invention is also correctly stated by the appellate court as follows:

> "In brief it may be said that the claimed invention relates to the problem of providing a simple and easy method of setting the buttons or keys of an automatic tuner so as to bring in, upon pushing any button or key, the desired broadcasting station selected from a broad band of frequencies." [R. 1188.]

The prior art tuner invented by Schaefer [R. 789] and manufactured by the Zenith Corporation during a two-year period before it was abandoned about 1928 [R. 147-148, 363], could be set "by a simple and easy method," but it required a great many parts. When attempts were made to simplify this mechanism in any drastic fashion, the method of setting the tuner was no longer "simple and easy." Efforts by many engineers to remedy the setting difficulties in simplified versions invariably resulted in the use of extra parts. Petitioner eliminated all the extra parts and removed all the setting difficulties by changing the shape and interrelation of the two basic members.

The opinion of the appellate court mentions many of the extra parts in the Schaefer tuner [R. 1196] manufactured by the Zenith Corporation and later discarded, and the court describes Marschalk's unsuccessful efforts to simplify it. [R. 1197 and 1189.] The record shows that the Crosley Corporation also sought to produce something better than the Schaefer device.

The engineers of respondent General Motors Corporation were also among those who attempted to simplify the Zenith-Schaefer tuner during the eleven year period between its appearance in 1927 and the issuance of petitioner's patent in 1938, but the device that resulted from

the efforts of respondent's engineers was still very complex. Although it was nevertheless manufactured commercially, it was finally abandoned in favor of petitioner's much simpler construction. Respondent then filed the instant Declaratory Judgment action in which the court was asked to hold that petitioner's combination was not an invention "in view of what was common knowledge and in view of the state of the art." [R. 7.]

The trial and appellate courts held that petitioner's combination would be obvious to any mechanic skilled in the art. Inasmuch as this combination was not obvious to respondent's own skilled mechanics and engineers, nor to Crosley's skilled mechanics and engineers, nor to Zenith's skilled mechanics and engineers, nor to Marschalk, these courts are manifestly wrong in holding that it would be obvious to any mechanic skilled in the art.

Petitioner contends that this decision is clearly in conflict with the demonstrated facts and with such applicable Supreme Court decisions as that rendered in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, 381; and that the lower courts' decisions are also in conflict with such applicable Supreme Court decisions as that rendered in *The Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corporation,* 340 U. S. 147, because the whole of petitioner's simplified combination "exceeds the sum of its parts" by accomplishing the desired result with far less parts than any of the combinations which the skilled workers in the art were able to conceive.

Petitioner further urges that the few grounds given by the appellate court for its conclusions reveal a serious departure from the accepted and usual course of judicial proceedings. Among these grounds was the contention

of the appellate court that it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the said testimony was given on direct examination and was controverted by the witness himself on cross-examination with the consequence that the said witness was not even mentioned in the trial court's opinion. The testimony that impressed the appellate court, incidentally, was given by General Motors' chief radio engineer who was responsible for the complicated structure that respondent's engineers designed when they attempted to simplify the Zenith-Schaefer tuner, and his testimony concerned the "obviousness" of petitioner's far simpler structure which respondent admittedly used in more than one million car radios after discarding the General Motors design.

The U. S. District Court for the Western District of Oklahoma, which held the claims here at issue valid and infringed by tuners patentwise like those of respondent, found that eight million such tuners had been manufactured and used by a group of concerns that did not include General Motors. [Finding 25, p. 32 of the record in *Leishman v. The Richards and Conover Company*, which respondent filed in the trial of the instant suit.]

Inasmuch as two of the claims at issue call for only two special parts and a spring and the remaining three claims add only an operating member to transmit motion to the said two parts, petitioner contends that there is

no reasonable excuse for all the complexities that have arisen in the litigation of this patent for the past thirteen years and that this Honorable Court should extricate petitioner from this litigious chaos. A brief history of the past litigation of this patent is given in the appendix hereto.

The automatic push button tuners manufactured by respondent admittedly contain the two special or basic parts mentioned in the two preceding paragraphs and called for in two of the claims, and they also contain an operating member as called for in the other three claims; but the Court of Appeals for the Ninth Circuit in this and preceding cases has insisted on reading a lever into each of these claims and has previously held that tuners patentwise the same as those of respondent do not infringe because they have been operated by plungers that push straight in instead of by levers as pictured in the illustrative embodiment shown in the patent. Three other courts, on the other hand, have not considered a lever to be a part of petitioner's combination. The specific cases where their views are set forth are discussed in the appended brief. The issue of infringement cannot be decided without resolving this conflict.

The ultimate decision in this case will determine the final outcome of the Declaratory Judgment suit filed against petitioner by Radio Condenser Company and General Instrument Corporation, the two firms previously mentioned as having since been convicted of violating the Sherman Act through activities involving tuners that are patentwise the same as those of respondent General Motors Corporation. These three concerns manufacture most of the automatic tuners used by the radio industry.

IV.
The Questions Presented.

Questions That Must Be Determined in Order to Dispose of This Suit.

1. Are claims 7 to 11 of Reissue Patent No. Re. 20,827 valid?

2. Must a lever *per se* be considered a part of petitioner's combination as held by the Court of Appeals for the Ninth Circuit despite the fact that none of the claims at issue call for a lever and claims 7 and 8 call for no operating member of any kind; or is a lever *not* a part of petitioner's combination as held by the Court of Appeals for the Tenth Circuit, the United States District Court for the Western District of Oklahoma, and by Judge Harrison of the United States District Court for the Southern District of California?[8]

3. Are claims 7 to 11 of the said patent infringed by the push button radio tuners manufactured by respondent?

In addition to these three questions, the following question of general importance is raised by the opinion of the appellate court:

4. In cases where those skilled in the art have failed after repeated efforts to discover a certain new and useful

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[8]The opinions of these courts in this matter are set forth in the third reason relied upon for the allowance of the writ, beginning on page 13 hereof, and in the portions of this appended brief that support this reason, beginning at page 38 of the brief.

improvement, is the presence of invention in its final discovery to be determined according to the formula recommended by this Honorable Supreme Court in *Expanded Metal Co. v. Bradford*[4] and generally followed by the various circuits and especially by the Court of Appeals for the Second Circuit,[5] or is the presence of invention to be determined upon the basis of whether the Court in retrospect is able, or thinks it is able, to explain the scientific principles involved?

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[4]In *Expanded Metal Co. v. Bradford,* 214 U. S. 366, at 381, this Honorable Court said:

> "* * * It may be safely said that if those skilled in the mechanical arts are working in a given field and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

[5]In *Landis Machine Company, et al. v. Parker-Kalon Corporation, et al.,* 190 F. 2d 543, 546, the Court of Appeals for the Second Circuit said:

> "* * * it scarcely needs more than the statement of the question to disclose the fatuity of asking judges, undisciplined in the craft and untutored in its inarticulate presuppositions, to say how far the innovation is beyond the powers of merely competent craftsmen. For that reason we have over and over again resorted to the history of what went before, the duration of the period during which the invention was needed but failed to appear and its acceptance when it did. These circumstances have seemed to us, not indeed an absolute determinant of invention, for there is none; but at least the best, and indeed almost always the only, rational approach to a solution."

V.

Reasons Relied Upon for the Granting of the Writ.

1. In determining the issue of invention, the appellate court, through the use of methods and standards in conflict with those used by this Honorable Court in its applicable decisions, has rendered a clearly erroneous opinion that will constitute a dangerous precedent tending to undermine established doctrine and to nullify the express intent of the patent laws and the constitutional provisions.

In the case of *The Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation,* 340 U. S. 147, this Honorable Court has recognized anew that invention is a display of skill beyond that of the skilled worker in the art, and that its presence is indicated when a "conjunction or concert of known elements" produces "surprising consequences" and contributes something in which "the whole in some way exceeds the sum of its parts."

The opinion of the appellate court ignores these standards.

"Surprising consequences" are obviously present in a combination that produces a desired result with many less parts than the skilled workers previously deemed necessary, which was the situation here.

In the present case, many skilled workers tried to simplify an early automatic push button radio tuner invented by Schaefer [R. 789] and once manufactured by the Zenith Corporation and later discarded because of its complexities. [R. 386-387.] The appellate court states that "Marschalk, who followed Schaefer, undertook to

simplify the Schaefer device . . ." [R. 1197], and that the "patent to Marschalk *proved unsatisfactory* [petitioner's emphasis] because of difficulty of avoiding 'creeping' during the process of adjusting the device so as to bring in the desired station." [R. 1188-1189.] It is thus clear that Marschalk did not know how to remove this difficulty, and the opinion admits [R. 1196] that Schaefer's device, which avoided this difficulty, required many extra parts.

The patent at issue was granted to petitioner for solving this problem without adding any extra parts whatever,[6] but the appellate court has held that any skilled worker in the art would readily arrive at petitioner's solution. This conclusion is repugnant to the Court's own statements regarding Marschalk's inability to solve the problem and Schaefer's failure to do so without adding many extra parts. Had the Court mentioned the many other engineers who worked on the simplification of the Zenith-Schaefer tuner, the gross error of its conclusion would be even more apparent.

Particularly bad in this regard is the omission from the opinion of any reference whatever to General Motor's own efforts that were specifically directed to simplifying the Schaefer tuner. Five engineers worked on the General Motors tuner project;[7] but the ultimate tuner, which actually went on the market, was only a slight simplifica-

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[6]During the prosecution of his patent, petitioner pointed out to the Patent Office that the Zenith engineers would not have tolerated all the extra parts in the Schaefer tuner if these parts could have been eliminated by ordinary mechanical skill. [R. 1023.]

[7]The supporting data for this statement are given in the portion of the appended brief devoted to this first reason for the allowance of the writ.

tion over Schaefer's. (Br. p. 20 *et seq.*) This General Motors tuner was ultimately abandoned in favor of petitioner's vastly simpler structure which respondent used in about one million Chevrolet, Pontiac and Buick car radios before the date of the trial. [R. 415.] After the General Motors engineers had failed to arrive at petitioner's simple combination, respondent filed this Declaratory Judgment suit asking the Court to hold that Petitioner's construction involved only mechanical skill. The trial and appellate courts obviously could not have acquiesced in this illogical and outrageous demand had they followed such applicable decisions of this Honorable Supreme Court as those in the *Supermarket* case, *supra*, and *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 381.

These matters will be more fully discussed in the appended brief.

2. The appellate court, in deciding the issue of invention, has not exercised the care which this Honorable Supreme Court has admonished the lower courts to use, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory powers.

The appellate court's irregularities in this respect include: (a) saying that it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the said testimony had failed to stand up under cross-examination and the said witness was accordingly not even mentioned in the lower court's opinion; (b) making con-

trolling statements of fact that were controverted right in the opinion by testimony previously quoted with apparent approval; and (c) accepting an admittedly made-over device from an obviously non-analogous art as an anticipation of petitioner's solution of the "creeping" problem.

The serious carelessness of the appellate court in these matters is thoroughly demonstrated in the appended brief, beginning at page 24 thereof.

3. There has long been a conflict between the Court of Appeals for the Ninth Circuit and three other courts including the Court of Appeals for the Tenth Circuit regarding whether petitioner's structure must be operated specifically by a lever and whether a lever per se is a part of petitioner's patented combination; and the Court of Appeals for the Ninth Circuit has now ballooned its old untenable contention that a lever is a part of this combination into a primary reason for holding that petitioner's contribution does not meet the test of invention which is applied in Pointer-Willamette Co. v. Six Wheel Corporation, 177 F. 2d 153.

If this Honorable Court should resolve this conflict by stating that the claims are not to be narrowed from their literal wording and that an operating member is therefore not a part of the combination claimed in claims 7 and 8 and that the operating member called for in the remaining claims does not have to be a lever, then the Court of Appeals for the Ninth Circuit could no longer hold that petitioner's combination does not meet the test for invention set forth in the *Six Wheel* case, *supra*. This would also automatically decide the issue of infringement.

This additional reason why the writ should be granted is more fully discussed in the appended brief, beginning at page 38 thereof.

4. Though two of the claims at issue call for only two simple parts and a spring, and the remaining three claims add only an operating member to transmit motion to the said two parts, the Courts of Appeals for the Ninth and Tenth Circuits have made a complicated litigious mess of the litigation of this patent by (a) ignoring the record of the failure of skilled engineers to arrive at petitioner's simple solution of the problem involved, (b) by ignoring the statements made on cross-examination by the expert witnesses opposing the patent, and (c), perhaps more seriously, by usurping the usual functions of an expert and then making their own initial findings of fact upon the basis of their own non-expert theories.

While the Court of Appeals for the Ninth Circuit in the instant case does not adopt nor express approval of the supposed scientific theories originated by the Court of Appeals for the Tenth Circuit, it nevertheless arrives at the same erroneous conclusion of non-invention by equally untenable initial findings of its own. By thus avoiding findings that are co-extensive with those of the Court of Appeals for the Tenth Circuit, the Court of Appeals for the Ninth Circuit has deprived petitioner of a clean-cut conflict to present to this Honorable Supreme Court relative to the issue of invention, although such a conflict exists as to whether the claims would be infringed. But the present situation is even worse than a conflict, because it is the culminating opinion in a long series of eleven in which this sort of thing has been going on. Al-

though Judge Chandler of the United States District Court for the Western District of Oklahoma thoroughly considered all the evidence and arrived at a complete understanding of the scientific principles involved by persistently cross-examining the witnesses himself, his pertinent findings and conclusion of invention (pp. 28-33 of the Richards and Conover record, filed in the present action by respondent) have come to naught because the appellate courts have brushed aside the admissions of the experts opposing the patent and substituted their own theories in the expert field.

For thirteen years your petitioner has been the frustrated victim of this sort of jurisprudence, sponsored by several large corporations, and this Honorable Court should now look into these unorthodox proceedings.

This fourth reason for the allowance of the writ is supported by facts referred to in the appendix, in the introduction to the brief, and throughout the discussion of the other reasons, and no portion of the brief has been devoted especially to this fourth reason.

5. This is a very important suit, the outcome of which will determine whether justice is ultimately to be realized from many years of litigation in three different circuits involving still other litigants who are now before the courts in the Ninth Circuit.

Although respondent, which brought this action, is itself the largest manufacturing concern in the world, the final decision in this suit will also be controlling in related proceedings in the Ninth Circuit involving General Instrument Corporation and Radio Condenser Company—two firms that previously benefited from an erroneous

decision (167 F. 2d 890) in a Declaratory Judgment action which they brought against petitioner as a part of activities later held to have been a violation of the Sherman Act. The United States District Court for the District of New Jersey has since convicted these two concerns of monopolizing 65% of the nation's business in tuning condensers for radio receivers and tuning condensers combined with automatic tuners. (87 Fed. Supp. 157.) All these tuners embodied the combination covered by the patent claims here at issue and are in all pertinent respects the same as those of respondent. A decision from his Honorable Court regarding the issues of validity and infringement in the present case will thus settle a controversy involving three very large and important concerns in the radio industry that together control nearly all the manufacturing of radio push button tuners. They have incorporated the invention which they pirated from petitioner in approximately ten million tuners, General Motors alone having admitted to the manufacture of one million prior to the date of the trial.

In the Declaratory Judgment action brought by Radio Condenser Company and General Instrument Corporation against petitioner, the Court of Appeals for the Ninth Circuit affirmed a summary judgment which held that their tuners did not infringe because they were operated by plungers instead of levers and that these well-known alternatives are not equivalents. However, one of these convicted violators of the Sherman Act specifically contended before the Patent Office that plungers and levers *are* equivalents, but they nevertheless prevailed in a joint suit against petitioner on the opposite premise that these alternatives are *not* equivalents. Subsequent to the entry of the affirmed summary judgment against petitioner in

the Declaratory Judgment action brought by these concerns, it has been discovered that their peculiar activities in the Patent Office and in the courts of the Ninth Circuit were all a part of their adjudged illegal activities in violation of the Sherman Act, and a timely motion was made to re-open the case on the grounds that these litigants came into court with unclean hands, and on the additional ground of newly discovered evidence as to the equivalence of levers and plungers—a part of such evidence being the contentions of one of these concerns before the Patent Office.

Radio Condenser Company and General Instrument Company manufactured all the tuners involved in the litigation respecting this patent in the Tenth Circuit, but the decision of the Court of Appeals of the Tenth Circuit is not *res adjudicata* with respect to them because they were not the nominal defendants and they did not intervene. The litigation involving Radio Condenser Company and General Instrument Corporation in the Ninth Circuit thus supersedes everything that took place with respect to the products involved in the Tenth Circuit. Inasmuch as the ultimate decision in the present case will be *stare decisis* with respect to these other litigants, a decision by this Honorable Court regarding the General Motors controversy will settle the matter for the manufacturers that control practically all the manufacturing of automatic radio tuners in America.

Where a decision by this Honorable Supreme Court would settle a controversy involving most of the concerns in a given field, this Court has not hesitated in the past to pass upon the issues. In *Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U. S. 477, most of the concerns were in a single circuit, but this Honorable

Court granted certiorari despite the fact that there was no conflict between circuits. In *Mackay Radio and Telegraph Company, Inc. v. Radio Corporation of America,* 306 U. S. 86, 59 S. Ct. 427, 83 L. Ed. 506, there were only two possible litigants, and certiorari was granted because an opinion of this Court would therefore settle the controversy for the entire industry as thus constituted.

If the present petition involving the General Motors case is not granted, petitioner will have no alternative but to drop the proceedings against Radio Condenser and General Instrument, because the erroneous decision of the appellate court in the present case would then become *stare decisis* in any re-opened proceedings involving the other litigants.

Since the present practice under the Declaratory Judgment Act will make it practically impossible ever to secure an independent adjudication of this patent in another circuit, it is extremely important that the final opinion in the instant case be the correct one. In *Triplett, et al. v. Lowell, et al.,* 297 U. S. 638, 56 S. Ct. 645 at 648, this Honorable Court said: "We conclude that neither the rules of the common law applicable to successive litigations concerning the same subject-matter, nor the disclaimer statute, precludes relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant." But if a patentee has once had an adjudication against his patent in the circuit where he resides, the doctrine expressed in *Triplett v. Lowell* is rendered ineffective, because anyone desiring to appropriate the teachings of his patent can thereafter come into his circuit under the Declaratory Judgment Act and obtain a rubber stamped judgment against him without a

trial just as Radio Condenser Company and General Instrument Corporation did in their suit against petitioner.

The facts above set forth are considered sufficient to support this fifth reason, and it is therefore not discussed in the appended brief except for references in the introduction thereto.

For the foregoing reasons your petitioner earnestly urges that his petition be granted.

Dated this 4th day of January, 1952.

LEROY J. LEISHMAN,
Petitioner in Propria Persona.

JOHN FLAM,
Counsel.

Certificate.

This petition is in my judgment well founded, and is not interposed for delay.

LEROY J. LEISHMAN,
Petitioner in Propria Persona.